

OHIO ETHICS COMMISSION

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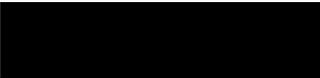


8 East Long Street, 10th Floor
Columbus, Ohio 43215
Telephone: (614) 466-7090
Fax: (614) 466-8368
Web site: www.ethics.ohio.gov

David E. Freel, *Executive Director*

January 23, 2007

Informal Opinion 2007-INF-0123-2

Rick Frank


Dear Mr. Frank:

On December 22, 2006, the Ohio Ethics Commission received your request for an advisory opinion. In your request, you explained that you are the Assistant Director for the Ohio Department of Administrative Services (DAS). You have asked whether you can be employed, by DAS, as Executive Director of the School Employees Health Care Board (Board).

Brief Answer

As explained more fully below and dependent upon the facts presented, the Ethics Law does not prohibit you from being transferred, within DAS, to the position of Executive Director of the Board. Because your public employer will remain the same, the revolving door and conflict of interest laws do not prohibit you from accepting the position or limit your ability, in the new position, to participate fully in matters on which you participated in your current DAS position.

Facts

As Assistant Director, you have served as legislative liaison for the agency. In that role, you participated in discussions regarding the creation of the Board by the General Assembly. In telephone conversations with Commission staff, you explained that you have also worked with the Board as a DAS employee.

The Board was created by the 126th General Assembly in H.B. 66, the state operating budget. R.C. 9.901. You explained that the Board is responsible for studying the feasibility of providing health care benefits for public school employees under a pooled arrangement. With respect to staff for the Board, Section 203.12.02 of the uncodified portion of H.B. 66 provides:

The foregoing appropriation item 100-403, Public School Employee Benefits, shall be used by the Director of Administrative Services to hire an executive director and an assistant responsible for providing administrative support to the School Employee Health Care Board and the public school employee health insurance program established under section 9.901 of the Revised Code.

You have explained that DAS has interpreted this provision to mean that DAS is the appointing authority for the Executive Director position, and that the Executive Director will be a DAS employee. The person would report to the Director of DAS and would be housed within DAS. You noted that it is not unusual for DAS staff to act as support for other state agencies.

You have also explained that, as the DAS legislative liaison, you participated in discussions regarding the board and its budget. However, you did not participate in the creation of the Executive Director position that is described in the legislation. During the discussion of the legislation, it was your understanding that DAS would be required to provide all administrative support for the Board and that funds appropriated in H.B. 66 would be used by DAS to cover existing personnel and expenses.

The Revolving Door Prohibition—R.C. 102.03(A)(1)

The Revolving Door Law, set forth in R.C. 102.03(A)(1), provides:

No present or former public official or employee shall, during public employment or service or for twelve months thereafter, represent a client or act in a representative capacity for any person on any matter in which the public official or employee personally participated as a public official or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion.

As Assistant Director at DAS, you are a “public employee” subject to R.C. 102.03(A)(1). R.C. 102.01(B) and (C).

During your public employment and for twelve months after you leave your public position, you are prohibited from representing any person on any matters in which you “personally participated.” You have explained that you personally participated in matters related to the creation of the Board. Therefore, if your employment as the Board’s Executive Director were to be employment with a *separate* public agency, R.C. 102.03(A)(1) would significantly compromise your ability to perform the duties of that position. For example, you would be prohibited from representing the Board, before DAS or the General Assembly, on matters in which you personally participated as Assistant Director and legislative liaison.

However, there is an exception to the prohibition:

Nothing contained in division (A) of this section shall prohibit, during such period, a former public official or employee from being retained or employed to represent, assist, or act in a representative capacity for the public agency by which the public official or employee was employed or on which the public official or employee served.

R.C. 102.03(A)(6). The Ethics Commission has explained that the exception of R.C. 102.03(A)(6) is available to a former public official or employee only where the official or employee is representing, assisting, or acting in a representative capacity for his former public agency. Ohio Ethics Commission Advisory Opinions No. 91-005 and 91-009.

R.C. 102.03(A)(1) is designed to protect the public interest by prohibiting situations from arising where a former public official or employee “will engage in a conflict of interest or realize personal gain at public expense from the use of ‘inside’ information.” State v. Nipps, 66 Ohio App.2d 17, 21 (1979). The exception of R.C. 102.03(A)(6) recognizes an absence of a conflict of interest or the realization of personal gain at public expense provided that the official or former official is retained to represent or assist the public agency by which he had been employed. But see R.C. 102.03(D) and (E) (discussed below) and Adv. Op. No. 87-008 (A member of a governing board of a public agency is prohibited from accepting employment with the public agency, even after he leaves the board position, if he used his position while on the board to secure the employment.) This exception would apply to you if you were to leave your employment at DAS and then be rehired by the Department as Executive Director of the Board.

In the situation you have described, you will not be rehired by DAS to take the position with the Board. Rather, the job change would be in the nature of a transfer within DAS from one position to another. It would be unreasonable to suggest that the Ethics Law prohibits a state department from promoting or transferring an employee to a new position within the same department where the employee will be expected to continue to work on the same matter or matters.

The Ethics Law does not prohibit DAS from transferring you from your current position as Assistant Director to a new position as Executive Director of the Board, because both are employment positions within DAS. This is true even though you will be required, as the Board’s Executive Director, to represent the Board’s interests on matters in which you participated as the DAS Assistant Director. In this situation, the ability of DAS and the Board to receive the advantage of your expertise would provide a benefit to DAS that is recognized by the exception in R.C. 102.03(A)(6), even if the exception does not directly apply.

Job-Seeking—R.C. 102.03(D) and (E)

R.C. Sections 102.03(D) and (E) also apply to questions of job-seeking:

- (D) No public official or employee shall use or authorize the use of the authority or influence of office or employment to secure anything of value or the promise or offer of anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties.
- (E) No public official or employee shall solicit or accept anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties.

You are a "public employee" subject to the prohibitions of R.C. 102.03(D) and (E). The term "anything of value" is defined to include an offer of future employment. See R.C. 102.01(G) and R.C. 1.03. Any offer of employment and the compensation that a person receives from the employment are things of value.

R.C. 102.03(D) prohibits a public official or employee from using the authority or influence of his public position to secure an employment opportunity for himself. Adv. Ops. No. 86-006 and 87-004. R.C. 102.03(E) prohibits a public official or employee from soliciting or accepting employment opportunities from a party while performing his official duties with respect to that party. Adv. Op. No. 92-005. Therefore, when an official or employee is seeking employment with a private company, non-profit organization, or public agency other than the one he or she currently serves, R.C. 102.03(D) and (E) would limit his or her activities.

However, R.C. 102.03(D) and (E) do not prohibit a public employee from applying for or accepting employment with the public agency he or she already serves.¹ As long as the employee does not use his or her current authority in a coercive or improper way, the law does not prohibit an employee for competing for or accepting a promotion or job transfer within his or her own public agency. The Commission reached the same conclusion in an opinion issued on April 24, 2006, to the Board of Regents about the employment of then-Chancellor Roderick Chu.

Profiting from a Public Contract—R.C. 2921.42(A)(3)

R.C. 2921.42(A)(3) provides that no public official shall knowingly:

During his term of office or within one year thereafter, occupy any position of profit in the prosecution of a public contract authorized by him or by a legislative body, commission, or board of which he was a member at the time of authorization, unless the contract was let by competitive bidding to the lowest and best bidder.

¹ An elected or appointed governing board member is prohibited from seeking employment with the agency he or she serves. Adv. Op. No. 87-008. This discussion applies only to individuals who are public employees and seeking a different employment position within the same agency.

As Assistant Director at DAS, you are a "public official" subject to R.C. 2921.42(A)(3). R.C. 2921.01(A). Therefore, R.C. 2921.42(A)(3) prohibits you, during your public service and after you leave your position with DAS, from profiting from any contract you "authorized."

In Advisory Opinion No. 2001-02, the Ethics Commission explained:

A public contract will be deemed to have been authorized by a public official, legislative body, board, or commission for purposes of R.C. 2921.42(A)(3), where the public contract could not have been awarded without the approval of the public official, the position in which he serves, or the public entity with which he serves.

The term "public contract" comprises the purchase or acquisition of services by or for the use of the state *including* any public employment. R.C. 2921.42(G)(1)(a).

You have explained that the Executive Director position was funded by the legislation on which you worked. However, you did not work on any aspect of the legislation regarding the position. Further, it is the Director, not you, with the authority to appoint the Executive Director.

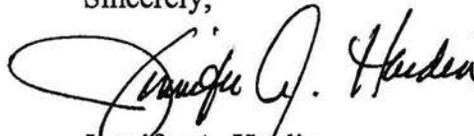
Based on the facts provided, your actions do not constitute the creation of the position or the authorization of a public contract within the definition of R.C. 2921.42(G)(1)(a). For that reason, the restriction in R.C. 2921.42(A)(3) does not apply to the facts presented here.

Conclusion

As explained more fully above and dependent upon the facts presented, the Ethics Law does not prohibit you from being transferred, within DAS, to the position of Executive Director of the Board. Because employer will remain the same, the revolving door and conflict of interest laws do not prohibit you from accepting the position or limit your ability, in the new position, to participate fully in matters on which you participated in your current DAS position.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on January 17, 2007. The Commission commends you for requesting guidance before taking any actions that could be prohibited by law. The opinion is based on the facts presented. It is limited to questions arising under Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code and does not purport to interpret other laws or rules. If you have any questions or desire additional information, please contact this Office again.

Sincerely,



Jennifer A. Hardin
Chief Advisory Attorney